

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2020-263-E**

Cherokee County Cogeneration  
Partners, LLC

Complainant,

 $\mathbf{y}_i$ 

Duke Energy Progress, LLC and  
Duke Energy Carolinas, LLC,

### Respondents.

## REBUTTAL TESTIMONY OF NATHAN HANSON

**Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

A. My name is Nathan Hanson and my business address is 1700 Broadway, 35th Floor New York, NY 10019.

**Q. HAVE YOU SUBMITTED TESTIMONY PREVIOUSLY IN THIS PROCEEDING?**

A. Yes. I filed Direct Testimony on May 3, 2021.

**Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

A. The purpose of this rebuttal testimony is to respond to the testimony of several of the Duke (DEC and DEP) witnesses.

**Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.**

A. Duke has refused to recognize the legally enforceable obligation (LEO) Cherokee created in September of 2018 that required Duke to base its avoided cost projections, including its avoided capacity costs, as of that LEO date. Instead, and contrary to PURPA, Duke offered pricing that not only ignored the LEO date, but had an expiration date, preventing

1 meaningful negotiation. Moreover, Duke's offers and course of dealing overlooked the  
2 ongoing relationship between the parties. Despite the fact that Cherokee has been  
3 providing its output to DEC for decades, and DEC has dispatched the Cherokee facility at  
4 a high volume on economic dispatch for many years, Duke "negotiated" with Cherokee  
5 as if it was a brand new, non-dispatchable facility in development with no operational  
6 history. Duke has also raised petty arguments and manufactured unnecessary roadblocks  
7 that stonewalled negotiations.

8 **Q. DO YOU AGREE WITH MR. KEEN'S CHARACTERIZATIONS OF DUKE'S**  
9 **NEGOTIATIONS WITH CHEROKEE?**

10 A. No. To the extent that Mr. Keen describes the timeline of communications (Keen Direct  
11 Exhibit 1), it appears that it roughly matches with our account in terms of dates.  
12 However, I certainly would not describe Duke as having engaged in "good faith  
13 negotiations" (Keen Direct, p. 4 ll. 15-16) at any point in this process.

14 **Q. WHY DO YOU SAY DUKE HAS NOT ENGAGED WITH CHEROKEE IN GOOD**  
15 **FAITH?**

16 A. While Duke did "respond" to our requests, its refusal to: 1) recognize Cherokee's LEO  
17 date and the rights created on that date, 2) acknowledge the history of its relationship  
18 with Cherokee and the Facility, or 3) provide support for its proposed rates, have  
19 prevented open and meaningful negotiations required by PURPA and the orders of this  
20 Commission. PURPA requires that utilities:

- 21 • Recognize non-contractual rights that arise as of the date a LEO is transmitted
- 22 to the utility;
- 23 • Provide QFs avoided costs that are calculated based on the utility's projected

1                   avoided costs as of the LEO date for the contract term; and

- 2                   • Provide QFs with the data needed to confirm the utility's avoided cost
- 3                   calculation.

4   **Q.   HOW HAS DUKE FAILED TO RECOGNIZE CHEROKEE'S AVOIDED COST**  
 5   **PRICING RIGHTS ASSOCIATED WITH CHEROKEE'S LEO DATE?**

6   A.   PURPA requires that Duke offer avoided cost calculations based on projections *as of the*  
 7   *LEO date* for the period of delivery under the contract. Contrary to the requirements of  
 8   PURPA, Duke repeatedly failed to provide pricing based on the date of the LEO. Instead,  
 9   Duke has provided Cherokee firm offers that expire after 60 days if a PPA is not executed  
 10   within that period. For example, Witness Bowman (Direct, p. 22) states that Duke's  
 11   avoided cost rates are only good for 60 days, and they are revoked if a PPA is not  
 12   negotiated within that time period." However, Ms. Bowman fails to cite to any authority  
 13   that would permit Duke to revoke its avoided cost rates provided in response to a LEO  
 14   after a period of 60 days. In fact, such a requirement violates PURPA, as the PURPA  
 15   LEO represents a "stake in the ground" that fixes the date of the calculation. There is no  
 16   "expiration" or "revocation," as the LEO is intended to protect the QF by locking in the  
 17   calculation date.

18   **Q.   PLEASE EXPLAIN THE PROBLEMS WITH DUKE'S PRICING PROPOSALS.**

19   A.   PURPA provides that it is the QF's right to have the avoided costs calculated for the  
 20   delivery period (in Cherokee's case beyond the December 31, 2020 expiration of the  
 21   current PPA) based on (i) avoided cost rates at the time of delivery or (ii) projections of  
 22   future avoided costs *as of the LEO date*.<sup>1</sup> The latter option – the QF's ability to

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<sup>1</sup> See 18 C.F.R. 292.304(d)(1).

1 established avoided costs as of the LEO date – is designed to protect QFs from precisely  
2 the type of actions that Duke has taken here to stall or avoid its PURPA obligations.  
3 Contrary to Mr. Keen’s testimony (p. 13, ll. 5-8), PURPA does not allow Duke to negate  
4 Cherokee’s LEO by deeming that “Cherokee’s right to the avoided cost rates provided in  
5 October 2018” expired according to its arbitrary 60-day timeline, coupled with the fact  
6 that Duke refused to provide support for its proposed avoided cost pricing. FERC has  
7 repeatedly advised that states cannot require a “utility-executed” contract as a  
8 prerequisite for establishment of a LEO, precisely because utilities can (and have)  
9 purposefully delayed negotiations or refused to agree to reasonable terms that a QF can  
10 accept.<sup>2</sup> If the utility had the ability to control establishment of a LEO, it could delay and  
11 obstruct until it no longer had a capacity need.

12 Such delays are not attributed solely to a complete failure of a utility to tender a  
13 contract as Duke suggests (Bowman Direct, p. 20, ll. 7-9); but also in proffering a  
14 contract that is not “executable” by the QF because it does not meet PURPA’s  
15 requirements. As this Commission recognized in its 2019 avoided cost proceedings  
16 implementing Act 62, LEOs are intended “to prevent a utility from circumventing the  
17 requirement that provides capacity credit for an eligible qualifying facility merely by  
18 refusing to enter into a contract with the qualifying facility.”<sup>3</sup> Duke acknowledged this in  
19 the 2019 avoided cost proceedings,<sup>4</sup> and this Commission recognized the same in stating  
20 unequivocally that “[c]ontrolling *or frustrating* the QF to form a LEO is prohibited by

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<sup>2</sup> *Id.* (citing Order No. 69).

<sup>3</sup> Order No. 2019-881(A) in Docket Nos. 2019-185-E and 2019-186-E, p. 140.

<sup>4</sup> Order No. 2019-881(A), p. 142 (“...given Witness Levitas’ comments regarding conditioning a LEO on an action by the utility (i.e., delivering the System Impact Study Report), the Companies believe it would be more appropriate to instead require the QF to have submitted a signed Facilities Study Agreement to the utility.”)

1 FERC.”<sup>5</sup> Here, Duke has obstructed and delayed negotiations, procured additional  
2 capacity as though Cherokee did not exist *after* Cherokee told Duke that it intended to  
3 sell its capacity to Duke at avoided cost rates pursuant to its rights under PURPA, and  
4 now claims it doesn’t need capacity because it consciously ignored Cherokee’s LEO.  
5 This course of action does not evince “good faith.”

6 **Q. WHY ARE AVOIDED COST PROJECTIONS AT THE TIME THE LEO WAS**  
7 **FORMED SIGNIFICANT TO CHEROKEE?**

8 A. As explained by Cherokee Witness Strunk, reasonable avoided cost pricing for Cherokee  
9 at the time the LEO was formed exceeds the October 2018 offer made by Duke, which  
10 should have included a capacity payment. Subsequent offers incorporated updates to the  
11 avoided cost forecasts and did not recognize Cherokee’s “stake in the ground.” It is my  
12 understanding that, under PURPA, avoided cost projections must correspond to the time  
13 of the LEO in September 2018. Duke’s earliest offers failed to recognize that Cherokee  
14 could displace utility capacity investment and that Cherokee should be paid for capacity.  
15 Duke’s subsequent offers ignore the LEO, make no attempt to base avoided cost rate  
16 projections at the time the LEO was established, and instead purport to offer avoided cost  
17 rates at the time the offer was made.

18 **Q. HOW HAS DUKE FAILED TO ACKNOWLEDGE THE EXISTENCE OF THE**  
19 **LEO?**

20 A. Since we initially contacted Duke with our LEO materials, they have consistently denied  
21 that we established a LEO. It is clear under FERC regulations, which must guide this

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<sup>5</sup> Order No. 2019-881(A), pp.133-134. (emphasis added). While I understand that Act 62 was directed toward small power producer QFs rather than cogeneration; FERC’s requirements for LEOs do not vary based on the type of QF.

Commission's implementation of PURPA, that the formation of a LEO turns on the actions of the QF, *not* the actions of the utility.<sup>6</sup> States cannot abridge this federal right under PURPA. While it is true that states may establish protocols or standardized processes to assist state public service commissions in determining whether a LEO has been formed, federal law invalidates any such state effort that would allow the *utility* to control "whether and when a legally enforceable obligation exists" for the reasons described above.<sup>7</sup>

**Q DO YOU AGREE WITH WITNESSES KEEN AND SNIDER THAT CHEROKEE DID NOT FILL OUT THE CORRECT NOTICE OF COMMITMENT (NOC) FORM?**

A. No. As a predicate matter, the claim that Cherokee did not fill out the "correct" form (Keen Direct, p. 11 ll. 10-13; Snider Direct, p. 14, ll. 2-5) is nonsensical, because 1) Cherokee conveyed the necessary information to Duke in order to establish its LEO (to the extent that Duke did not already have that information based on the ongoing relationship between the parties); and 2) Duke never made available any "correct" form for Cherokee to use. In submitting our LEO materials, we had asked if Duke needed any other information or had any other form we were to use, and they never asked for further information or pointed us to another form. However, without a form or PSC approved

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<sup>6</sup> See *FLS Energy, Inc.*, 157 FERC ¶ 61,211 (2016) ("We find that, just as requiring a QF to have a utility-executed contract, such as a PPA, in order to have a legally enforceable obligation is inconsistent with PURPA and our regulations, requiring a QF to tender an executed interconnection agreement is equally inconsistent with PURPA and our regulations. **Such a requirement allows the utility to control whether and when a legally enforceable obligation exists – e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement. Thus, the Montana Commission's legally enforceable obligation standard is inconsistent with PURPA and our regulations under PURPA.**") See Also [2019 PSC order] at p. 146 ("We agree with witness Levitas that obtaining permits and land-use approvals prior to establishing a LEO is unreasonable, since this process is clearly expensive and time-consuming, and would come at a time that the QF has not secured a price for its output, and the QF would therefore lack financing.")

<sup>7</sup> *Id.*

1 process for us to create a LEO, Duke still must abide by PURPA and recognize the  
2 substance of a LEO as of the date submitted by Cherokee.

3 Accordingly, without clear direction from Duke's website or a documented LEO  
4 process, and consistent with our prior course of dealings, we established a LEO by 1)  
5 contacting Duke regarding our expiring PPA term noticing Duke of our intent to put our  
6 power to Duke for a new contract term, and 2) filling out every available form that Duke  
7 made available for good measure, even though it asked for information that Duke already  
8 had. We formed this LEO far enough in advance such that Duke could avoid capacity  
9 additions by planning to take power from Cherokee. Cherokee cannot be faulted or  
10 penalized for trying to facilitate Duke's review of our LEO, by using a form that Duke  
11 itself had issued and tailoring that form to provide relevant information.

12 **Q. HAS DUKE AT ANY POINT OFFERED CHEROKEE A CONTRACT**  
13 **CONSISTENT WITH PURPA REQUIREMENTS?**

14 A. As I explained in my direct testimony, and contrary to Duke Witness Snider (Direct pp.  
15 17-32) and Duke Witness Freund (Direct pp. 4-11), no it has not. While Duke has not  
16 been sufficiently cooperative in providing data to allow us to calculate Duke's avoided  
17 costs with precision, as discussed by Cherokee Witness Strunk it is apparent that Duke  
18 has offered us avoided cost rates below what we are entitled to under PURPA. By failing  
19 to calculate avoided costs based on our LEO date (including the capacity payment in  
20 effect for other QFs at the time) and offer us a PPA we could reasonably execute, Duke  
21 has frustrated our efforts to both acknowledge our LEO generally on a non-contractual  
22 basis and to enter into any kind of reasonable contractual arrangement under a PPA. This  
23 is why Cherokee must hold Duke to its non-contractual LEO. As I show in Table 1

below, each of Duke's offers was deficient and did not comply with Duke's obligations under PURPA.

Table 1: Timeline of Offers

Date	Offered by	Deficiencies
October 31, 2018	Duke Energy Carolinas	<ul style="list-style-type: none"> <li>– Did not appropriately take into account the dispatchability of the Cherokee facility.</li> <li>– Discriminatory; did not provide compensation for avoided capacity costs. (See Strunk Rebuttal, p.11).</li> <li>– Inconsistent with Order 2016-349 and FERC's Implementing Regulations. (See Strunk Rebuttal).</li> </ul>
February 1, 2019	Duke Energy Progress	<ul style="list-style-type: none"> <li>– The transmission arrangements were not offered in a manner consistent with DEC and DEP's merger commitments.</li> <li>– Did not appropriately take into account the dispatchability of the Cherokee facility.</li> </ul>
June 24, 2020	Duke Energy Progress	<ul style="list-style-type: none"> <li>– Included avoided cost rates, but on terms that ran contrary to those approved in Order 2020-315(A).</li> <li>– Offered a form PPA appropriate for a solar QF and inappropriate for a dispatchable facility like Cherokee.</li> <li>– Disputed the establishment of a LEO.</li> </ul>
December 15, 2020	Duke Energy Carolinas	<ul style="list-style-type: none"> <li>– Offered an "as available" contract.</li> <li>– Failed to provide contract rates until after the delivery of energy to Duke such that Cherokee would have no idea whether its plant would be economic to run.</li> </ul>
February 10, 2021	Duke Energy	<ul style="list-style-type: none"> <li>– Apparently took dispatchability into account, but:</li> <li>– Avoided energy costs were not aligned with the Cherokee LEO date.</li> <li>– Avoided capacity costs were not aligned with the Cherokee LEO date.</li> </ul>

**Q. DO YOU BELIEVE THAT DUKE IS OBLIGATED TO OFFER CHEROKEE HIGHER THAN AVOIDED COST RATES TO SUSTAIN CHEROKEE'S FINANCIAL VIABILITY AS WITNESS BOWMAN (DIRECT P. 9, LL. 11-13) AND WITNESS KEEN (DIRECT P. 9, LL. 6-20) CLAIM?**

A. No, these witnesses are mistaken, and I have never represented that. I explained in my direct testimony certain business background and how we use our revenues; I never said or implied that the calculation of avoided costs incorporated any consideration of Cherokee's needs. However, the failure of Duke to honor its statutory PURPA rights is damaging to Cherokee's business, which is grounded in the economic regulation of PURPA, and shows that Duke's failure to negotiate in good faith (as required by this Commission) has harmed Cherokee.

**Q. DUKE'S WITNESSES REPEATEDLY REFER TO YOUR TERM SHEETS AS "UNSOLICITED." DOES THAT LESSEN DUKE'S OBLIGATIONS UNDER PURPA?**

A. No. South Carolina requires that large cogeneration QFs negotiate with utilities for PPA terms—that is precisely what we tried to do.

**Q. DO YOU AGREE WITH WITNESS SNIDER'S ANALOGY (DIRECT P. 15, LL. 2-10) THAT CHEROKEE'S EFFORTS WERE SIMILAR TO COMMITTING TO SELL A CAR TO TWO DIFFERENT USED CAR DEALERSHIPS?**

A. No, the analogy fails and in fact demonstrates that Duke is not credible to represent that it negotiated with us in good faith. The proposition that "Cherokee appears to have toggled back and forth between the Companies to see where it could get a better deal" (Snider Direct p. 15, ll. 1-2) is refuted by the fact that Cherokee sent both its LEOs to Mr. Keen

(who as described in his Direct Testimony works for both DEC and DEP). Accordingly, both DEC and DEP were completely aware of Cherokee's intent—that is, to allow Duke the maximum flexibility to most economically serve its customers with Cherokee's output. In fact it was Mr. Keen who suggested that DEP had a nearer term capacity need and suggested Cherokee file a LEO with DEP. Cherokee was indifferent to DEP or DEC, and was looking to supply Duke in a manner that would provide them the most flexibility. Further, as established in my direct testimony, FERC clearly permits QFs to split its output among different offtakers—FERC very recently recognized that there are situations where a “utility interconnecting a QF does not purchase all of the QF's output and instead transmits the QF power in interstate commerce,” including where the “QF sells, plans to sell, or has the express right to sell to any of its output to an entity *other than* the utility directly interconnected to the QF.”<sup>8</sup> Unlike a car, Cherokee's output is a commodity measured in MW units, and I can offer some units to one offtaker, and other MWs to another. However, one would not sell the engine of one's car to one dealership, and the body of one's car to another. The suggestion of duplicity or lack of intent to put power to Duke due to the “double LEO” defies common sense given the nature of the product for sale. It is not as though I made a promise to one car dealer, took their money, and walked across the street to sell it to another as Mr. Snider suggests. Additionally, Witness Bowman (Direct p. 24, ll. 1-7) takes certain comments Cherokee has made to FERC completely out of context—in no way does Cherokee's maintenance of its tariff to sell at market-based rates undercut Cherokee's offer to Duke—it only maintains third-party non-PURPA sales as an option (for example, in the event of Duke refusing to

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<sup>8</sup> See *Cherokee County Cogeneration Partners, LLC*, 175 FERC 61,002, at P 17 (2021).

1 contract with Cherokee).

2 **Q. DID DUKE NEGOTIATE IN GOOD FAITH TO ALLOCATE CHEROKEE'S**  
3 **ENERGY AND CAPACITY IN A WAY THAT WOULD BEST SERVE DUKE'S**  
4 **CUSTOMERS?**

5 A. No, although we gave them every opportunity, including the option to put all or part of  
6 Cherokee's output to DEP. DEP was actively soliciting proposals to meet a capacity need  
7 beginning in December of 2020. At various times during negotiations, Duke postured  
8 that QFs were not eligible to be designated as "network resources" for transmission, and  
9 that we would be required to take "point-to-point" service to deliver our power to DEP.  
10 Duke's reaction is especially puzzling given that; in my experience, it is not at all  
11 uncommon for utilities to designate QFs as network resources. See Table 2 below (and  
12 Exhibits 1-3) for a number of examples:  
13

Table 2: Example QF Network Resource Designations

<b>Transmission Provider</b>	<b>Qualifying Facilities Designated as Network Resources</b>
Southern Companies (See Ex. 1 Designated Network Resource List)	<ul style="list-style-type: none"> <li>– FERC Docket No. QF12-120 – Coca-Cola QF</li> <li>– FERC Docket No. QF18-188 – GRP Madison, LLC</li> <li>– FERC Docket No. QF16-755 – Old Midville Solar</li> <li>– FERC Docket No. QF15-439 – Rincon Solar</li> </ul>
Public Service Company of New Mexico (See Ex. 2 Designated Network Resource List)	<ul style="list-style-type: none"> <li>– FERC Docket No. QF19-927 – Vista SEC</li> <li>– FERC Docket No. QF20-575 – Britton Solar Energy Center</li> </ul>
Southwest Power Pool (See Ex. 3 Designated Network Resource List)	<ul style="list-style-type: none"> <li>FERC Docket No. QF08-148 – Sleeping Bear, LLC</li> <li>FERC Docket No. QF03-11 – Blue Canyon</li> </ul>

Further, since Cherokee is a dispatchable facility, it most naturally fits with the network “integration” service that DEC and DEP offer under their OATTs. Cherokee is not offering a block energy product that is delivered from a single source bus to one sink. Rather, similar to the other DEP network resources that DEP uses to serve its network load, the Cherokee resource assists Duke to serve native loads at many delivery points under an integrated approach to dispatch. Point-to-point transmission does not fit the model under which Cherokee has been dispatched by DEC under its joint dispatch arrangements with DEP. Under a dispatchable tolling agreement scenario—the most economic option for Duke to structure its offtake—Cherokee would not know in advance whether DEP would call on it to run, and it would not have knowledge of DEP’s preferred point of delivery. It would be unduly burdensome, discriminatory, and

1 expensive to expect Cherokee to make point-to-point arrangements across DEC's system  
2 to DEP, as though DEC and DEP were two completely unrelated utilities, instead of  
3 affiliated companies operating under a Joint OATT that allows for non-pancaked  
4 deliveries of power between DEP and DEC. Such an arrangement would not make the  
5 most prudent use of Cherokee's output as Duke should be expected to do for its  
6 customers.<sup>9</sup> To be clear, Cherokee has never represented that it expected network service  
7 arrangements to be free—Cherokee would gladly pay any reasonable incremental costs  
8 associated with appropriate, non-discriminatory network service transmission to  
9 accomplish the arrangements.

10 **Q. WHY DID CHEROKEE EVEN CONSIDER SELLING ITS OUTPUT TO DEP**  
11 **WHEN IT IS INTERCONNECTED TO DEC?**

12 A. In discussions with DEC, we had confronted them about not providing us with a capacity  
13 payment, despite their having a capacity need. DEC indicated that it did not recognize  
14 the capacity need on its own system until 2028. However, Duke pointed us to DEP as  
15 having a capacity need sooner, and so we pursued that route in a good faith effort to  
16 negotiate as South Carolina prefers. Rather than facilitate transmission to accomplish a  
17 sale to DEP, as one would expect if Duke were negotiating in good faith; it now faults us  
18 for engaging with DEP—Duke's own suggestion—to try to deprive us of our LEO right  
19 under PURPA, and impose unreasonably onerous requirements that would require  
20 Cherokee to procure point-to-point transmission where DEP could easily designate  
21 Cherokee as a network resource at no incremental cost to its customers.

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<sup>9</sup> As I explained in my direct testimony (p.18, ll. 4-13 and n. 10), it is apparent that Cherokee satisfies the definition of Network Resource under section 1.37 of DEP's OATT.

**Q. WOULD YOU BE BURDENING DUKE'S RATEPAYERS BY BEING DESIGNATED AS A NETWORK RESOURCE, AS WITNESS BOWMAN ALLEGES (DIRECT P. 36, LL. 14-21)?**

A. No. As I discussed in my Direct Testimony, such a designation is contemplated by Duke's representations in its merger application and the Joint OATT; and is further supported by Duke's Business Practice Manual.<sup>10</sup> Witness Bowman faults Cherokee for not submitting a transmission service request to reserve transmission for transfer to DEP. However, for network transmission service, it would be the Network Customer—DEP—who would designate Cherokee as a network resource to serve DEP's network load. Cherokee does not have the ability to unilaterally designate a DEP network resource. However, if the Commission directs DEP to purchase all or a portion of Cherokee's power; designation of Cherokee as a network resource is an immediate, flexible way to implement the Commission's directive that does not involve excessive transmission charges to Cherokee or disregard of Duke's merger commitments.

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<sup>10</sup> See e.g., Duke Energy Progress, LLC's OASIS Business Practice, Section E, p. 45 (effective 06/01/2021) available at <http://www.oatioasis.com/cpl/>; [https://www.oasis.oati.com/woa/docs/CPL/CPLdocs/DEP\\_Business\\_Practices\\_effective\\_06-01-2020\\_posted\\_05-18-2020\\_-\\_CLEAN.pdf](https://www.oasis.oati.com/woa/docs/CPL/CPLdocs/DEP_Business_Practices_effective_06-01-2020_posted_05-18-2020_-_CLEAN.pdf) ("The Joint OATT provides for a zonal rate structure for transactions involving more than one of the Duke Energy Carolinas (DEC), Duke Energy Progress (DEP) and/or Duke Energy Florida (DEF) transmission systems. Under the zonal rate structure, transmission customers who use only one of the zones will pay the rate applicable to that zone. The customer will be charged only the rate for the zone in which the load is located or from which the power is removed from the system. For example, a Network Customer using PTP or NITS to serve load located in a different zone pays only the applicable charge in the zone where the load is located")

1 **Q. WITNESS BOWMAN SUGGESTS (DIRECT PP. 20-21) THAT FERC’S ORDER**  
 2 **NO. 872 REQUIRES THAT CHEROKEE DEMONSTRATE ITS**  
 3 **FINANCEABILITY TO THE REGULATORY AUTHORITY AS A PRE-**  
 4 **REQUISITE TO SECURING A LEO. IS THAT ACCURATE?**

5 A. No. Witness Bowman misstates Order no. 872 (O.872) in this regard. That rule  
 6 explicitly applies to new QFs in development, not existing QFs. (O.872 at P 684). The  
 7 rule stated that QFs already in operation *have necessarily* demonstrated a commitment to  
 8 construct the project, the Commission stated that it did not intend commercial viability  
 9 and financial commitment requirements to serve as prerequisites to QFs already in  
 10 operation with existing LEOs to obtaining new LEOs.” O.872 at n. 995.

11 **Q. DID O.872 UNDERCUT A QF’S ABILITY TO LOCK IN AVOIDED COST**  
 12 **RATES THROUGH A LEO?**

13 A. No. It is ironic that the Duke witnesses, including Bowman (Direct, p. 21) and Snider  
 14 (Direct, p. 9) seek to use O.872 to try to obstruct our LEO. In discussing this viability  
 15 requirement, FERC explained that “[t]he objective and reasonable criteria we have  
 16 established will protect QFs against onerous requirements for a LEO that hinder  
 17 financing, such as a requirement for a utility’s execution of an interconnection agreement  
 18 or power purchase agreement, **or requiring that QFs file a formal complaint with the**  
 19 **state commission**, or limiting LEOs to only those QFs capable of supplying firm power,  
 20 or requiring the QF to be able to deliver power in 90 days.” (O.872 at P 689) (Emphasis  
 21 added). That bolded point is precisely what Witnesses Snider and Bowman suggest—  
 22 that our right to a LEO must be established by the PSC only after our complaint and a  
 23 demonstration that it has exhausted all options with Duke. However, such action by a

1 state would be plainly impermissible under PURPA.

2 **Q. WHAT WOULD YOU HAVE EXPECTED DUKE WOULD HAVE DONE IN**  
3 **GOOD FAITH NEGOTIATIONS?**

4 A. As I have stated previously, Duke's frustration of our rights centers around its flat refusal  
5 to acknowledge that we have LEO rights, and to calculate avoided costs based on that  
6 that LEO. Consistent with our prior course of dealings, I would have expected Duke to  
7 control costs for its customers by entering into a tolling agreement structure (like the  
8 structure it finally offered in 2021 as Witness Strunk describes), in 2018 rather than force  
9 discussions using the structure they use for solar PPAs that don't have fuel requirements.  
10 A solar offtake PPA is inappropriate for a highly dispatchable, efficient natural gas  
11 cogeneration resource with variable fuel costs like Cherokee. Duke knows this, and  
12 though it ultimately acquiesced in 2021(several years into negotiations) to a structure that  
13 has served both parties well under the existing PPA, it has yet to offer us this structure  
14 with appropriate avoided energy costs or capacity payments based on our LEO date.

15 **Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY AND THE RELIEF**  
16 **CHEROKEE IS SEEKING FROM THE COMMISSION.**

17 A. Certainly. Duke recognizes that it is the QF's option, not the utility's, to have the avoided  
18 cost rate calculated (i) based on projections of avoided costs as of the LEO date for the  
19 contract term, or (ii) at the time of the delivery of the QF's power (see Bowman Direct,  
20 p. 19; Snider Direct, p. 15). However, Duke's tactics have undercut our ability to have the  
21 avoided cost rates based on when the LEO was established in 2018. The discussions  
22 should have involved the proper calculation of the avoided cost rate in 2018, as well as  
23 the projected future avoided cost rates based on the data and assumptions in 2018.

1        Instead, as I noted previously about the lack of good faith negotiations, Duke 1) failed to  
2        provide us with sufficient supporting data for the avoided cost rate that they provided; 2)  
3        dragged out the process for over 2 years; 3) raised impediments to transmission service  
4        that do not exist; and 4) now quote current avoided cost rates, not the avoided cost rates  
5        projected at the time our LEO was established. So while Duke recognizes the clear  
6        PURPA options that rest with the QF, not the utility, they have disregarded our LEO  
7        rights and are offering current rates at the time of delivery, which was not the option we  
8        selected. From a policy standpoint, if Duke continues to proceed in this manner with  
9        other QFs, I expect that Duke's tactics will lead to more complaints; or worse for  
10       customers, facilities being retired before they ought to be from an economic standpoint.  
11       Cherokee requests that this Commission direct Duke to offer us a 10-year PPA under a  
12       tolling agreement structure like that Duke finally offered to Cherokee in January 2021,  
13       but to revise the contract price to match Duke's avoided costs as of September 2018, as  
14       Witness Strunk describes.

15    **Q.       DOES THIS CONCLUDE YOUR TESTIMONY?**

16    **A.       Yes.**